EVERETT J. JOHNSON

IBLA 85-272 Decided January 12, 1987

Appeal from a decision of the Albuquerque District Office, Bureau of Land Management, which dismissed a protest to the cancellation of Homestead Entry No. SF 068923.

Affirmed.

1. Homesteads (Ordinary): Generally -- Homesteads (Ordinary): Cultivation -- Homesteads (Ordinary): Military Service -- Homesteads (Ordinary): Relinquishment -- Homesteads (Ordinary): Second Entry

   Where a homestead claimant failed to show the applicable residence and cultivation requirements were met, his homestead entry was properly cancelled. Prior to passage of the Federal Land Policy and Management Act of 1976, a preference right of entry for certain veterans was allowed; however, in such cases homestead entry must have been made subsequent to the veteran's discharge from service. Where a veteran had made a homestead entry prior to entry into service, and relinquished his homestead claim several years prior to enlistment, the veterans preference provision of 43 U.S.C. § 279 (1976) was not available to him.

2. Rules of Practice: Protests

   In adjudicating a 1984 protest against a 1939 cancellation of a homestead entry, BLM properly dismissed the protest. A protest properly is an objection to a proposed action, and may not be used to challenge an action which has been completed.

APPEARANCES: Everett J. Johnson, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Everett J. Johnson has appealed a decision dated December 11, 1984, issued by the Albuquerque District Office, Bureau of Land Management (BLM), which dismissed his protest against cancellation of Homestead Entry No. SF 068923. The decision recites that the homestead entry was cancelled

May 31, 1939, that there is no evidence an application for reinstatement of the cancelled entry was ever filed, and that the land identified in the homestead entry has since been patented. Appellant had based his protest against the cancellation of his homestead entry, which was initiated in 1934, upon the assertion he was serving with the armed forces of the United States at the time the entry was cancelled and was not given notice of the cancellation. The December 11 decision then rejected appellant's protest based upon a review of the record of his entry, stating:

> 1. The file contains a copy of the letter mailed to you on May 26, 1939, cancelling your entry together with a certified card signed by you as having received the letter on May 26, 1939. A copy of the letter and certified card are enclosed.
>
> 2. The file also contains a relinquishment of the entry which was signed by you and filed in the District Land Office May 31, 1939. A copy of the relinquishment is also enclosed for your review.

(Decision dated Dec. 11, 1984, at 1). Appellant does not challenge either of these findings on appeal to this Board, but argues that he nonetheless is entitled to relief because he is a disabled veteran of World War II.

In his statement of reasons for appeal Johnson admits that on May 31, 1939, he relinquished to the United States all of his rights to the entry in question. He explains, however, "[t]here was an additional letter enclosed in the same envelope that did explain my reason for doing such." Johnson further states:

> That reason was that I was going to join the forces to help defend [the] United States of America * * *. * * * When I returned to Cebolla in the Spring of 1946, I learned there was nothing on the land in the form of improvements and I made a trip to the Land Office and was informed the case was closed. In protest of this, I wrote several letters, [including] one to * * * Senator Clinton P. Anderson. I was allowed an interview in the Federal Building on Gold Ave. I believe there should be evidence of this in the files of Senator Anderson.

Johnson further states that he is a disabled veteran and has "no intention of trying to create any kind of trouble for the 120 acres of land in question but [he does have] a just right to expect to be allowed 120 acres of other lands that are equal in value to the lands in question."

[1] Entry of unappropriated public lands was provided for by 43 U.S.C. § 161 (1976), repealed by P.L. 94-579, Title VII, § 702, Oct. 21, 1976, 90 Stat. 2787, the Federal Land Policy and Management Act of 1976 (FLPMA). Departmental regulations at 43 CFR Part 2510, provide the conditions for homestead entries: proof of homestead entry is governed by 43 CFR 2511.3-4 and requirements for proof appear at 43 CFR 2511.4. Appellant has provided no evidence that any of the conditions for homestead entry were met by him.

Such a showing is an essential element of any homestead claim. See generally Richard L. Nevitt, 47 IBLA 257 (1980); James R. Murphey, 20 IBLA 129 (1975); Thomas B. Kimball v. William Henry Selby, 20 IBLA 23 (1975). He instead relies entirely upon his status as a veteran to obtain the relief he seeks.

Before it was repealed in 1976, 43 U.S.C. § 279 (1976) provided pertinently:

> Any person who has served in the military or naval forces of the United States for a period of at least ninety days at any time on or after September 16, 1940, * * * and is honorably discharged from the military or naval forces and who makes homestead entry subsequent to such discharge shall have the period of such service, not exceeding two years, construed to be equivalent to residence and cultivation upon the land for the same length of time. Credit shall be allowed for two years' service to any person who has served in the military or naval forces of the United States during the above period (1) if such person is discharged on account of wounds received or disability incurred during the above period in the line of duty, or (2) if such person is regularly discharged and subsequently is furnished hospitalization or is awarded compensation by the Government on account of such wounds or disability. * * * No patent shall issue to any such person who has not resided upon his homestead and otherwise complied with the provisions of the homestead laws for a period of at least one year: Provided, That such compliance shall include bona fide cultivation of at least one-eighth of the area entered under the homestead laws: * * *. [Emphasis added.]

It does not appear appellant could be seeking relief under any other Act.

With the exception of its application to Alaska, 43 U.S.C. § 279 (1976) was repealed, effective October 21, 1976, by Title VII, § 702 of FLPMA, 43 U.S.C. §§ 1701-1784 (1982). In any event, assuming that relief could be obtained under this statute, the veteran's preference invoked by appellant, 43 U.S.C. § 279 (1982), applied only to persons making homestead entry subsequent to discharge following service commencing in 1940 or later. It is apparent that appellant both made entry and relinquished his claim prior to 1940. His protest establishes that he enlisted in the Navy on November 16, 1942. Since his 1934 homestead entry was previously cancelled on May 31, 1939, it is clear that appellant's reliance upon a claim of veteran's preference as a means to reinstate his 1934 entry under section 279 is misplaced. See generally Roland & Marie Oswald, 35 IBLA 79 (1978).

[2] Although BLM considered appellant's protest on its merits before rejecting his attempt to receive this 47-year old claim, it was not necessary to do so. A protest is properly an objection to an "action proposed to be taken." See 43 CFR 4.450-2. In this case the action taken was the cancellation of his 1934 entry, an event which occurred finally on May 31, 1939, when appellant filed the relinquishment of his claim. Admittedly, he now argues he was not given notice of this event: his argument on this point

also, however, is not well taken in view of the fact that the cancellation arose from appellant's voluntary relinquishment of his claim. He does not argue that this action was not voluntary on his part, but only suggests that he conditioned his relinquishment upon the retention of a veteran's preference. Since this argument has no apparent factual or legal basis, BLM properly dismissed his protest. See Williamette Logging Communications, Inc., 86 IBLA 77 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Wm. Phillip Horton
Chief Administrative Judge